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The courts seem to have performed consistently their clear though often difficult duty of maintaining the spirit if not the form of our government by checking the more flagrant and unnecessary instances of confusion of powers while allowing the mixture of powers where, as is frequently the case in the administrative department,³¹ it is peculiarly necessary. It seems probable that in the future a growing conception of what is peculiarly necessary will prevent the constitutional requirement of a division of powers from proving a serious check on the gradual development of administrative commissions, and closer coöperation between the departments. But any more radical changes in government must be sought by amendment. The American system of government was designed chiefly to secure a maximum of individual freedom. It is for the student of political science to accommodate that system to an increasingly paternal government which naturally inclines toward the efficiency³² of an administrative or commission government.

EFFECT OF AN OPTIONAL CONTRACT TO BUY LAND. — There are three types of contracts by which an option to buy land may be given to a prospective purchaser. The vendor in return for a consideration paid may promise to convey the land on tender of the price within a specified time.¹ This is a unilateral agreement analogous to a life-insurance contract. Secondly, the vendor may make an offer to sell for a given price and a unilateral contract to hold this offer open for a specified time.² The unilateral contract will be specifically enforced since damages at law are inadequate, and, as the purchaser has paid his consideration, no objection can be made on the ground of mutuality.³ When the option is exercised a bilateral contract for the sale of the land arises. Thirdly, the vendor may make an irrevocable offer to sell for a definite price within a fixed time. In some states an offer under seal has this effect.⁴ Here as in the second case, a bilateral contract arises upon the acceptance of the offer. In each case, however, the purchaser has a right to specific performance of the contract and cannot be refused the land on performing or

³¹ See decisions on this point collected in 66 CENT. L. J. 24.

³² It is sometimes said that the division of powers was intended to enhance the efficiency of government. See 20 YALE L. J. 88. This seems to contradict the entire purpose of the framers of the Constitution, which was not to avoid friction but through the friction of the departments to save the people from tyranny. See citation *supra*, notes 1, 2. Certainly in practice the system of checks has not contributed to efficiency. See BRYCE, AMERICAN COMMONWEALTH, Chap. xxvi.

¹ Cf. *Borel v. Mead*, 3 N. M. 84, 2 Pac. 222. See an article by Professor Langdell in 18 HARV. L. REV. 1, 11. It is to be observed that in this class of cases there is no obligation on the purchaser to perform even after he has given the vendor notice of his intention to do so. Hence courts are inclined to find that the parties made a contract of the second or third type. See 18 HARV. L. REV. 457.

² *Ross v. Parks*, 93 Ala. 153, 8 So. 368; *Brown v. Slee*, 103 U. S. 828; *Boyden v. Hill*, 198 Mass. 477, 85 N. E. 413.

³ *Guy v. Warren*, 175 Ill. 328, 51 N. E. 581. Even when the vendor has simply given a first refusal and is not bound to sell to the holder of the refusal equity will enjoin him from selling to anyone else. *Manchester Ship Canal Co. v. Manchester Racecourse Co.*, [1901] 2 Ch. 37.

⁴ *O'Brien v. Boland*, 166 Mass. 481, 44 N. E. 602; *McMillan v. Ames*, 33 Minn. 257, 22 N. W. 612.

offering to perform the necessary conditions precedent. Since the creation of equitable estates is a generally recognized consequence of the right to specific performance, it would seem that in all three cases a springing use, *i. e.*, a contingent equitable interest in the land analogous to an executory devise, arises on the giving of the option. On this theory it has been held that an option exercisable beyond the period allowed by the rule against perpetuities cannot be specifically enforced against a purchaser of the land,⁵ even though damages for breach of the contract may be recovered at law from the vendor.⁶ On this theory, also, several decisions,⁷ including a recent North Dakota case, holding that an option contract may be enforced against an intervening donee or purchaser with notice can be explained. *Horgan v. Russell*, 140 N. W. 99 (N. D.). For an equitable interest in the land cannot be destroyed by a conveyance of the fee to anyone but a *bonâ fide* purchaser for value without notice. Most cases of this type, it is true, might also be explained on the doctrine that equity regards it as unconscionable for a donee or purchaser with notice to hold property to which a third party has a contract right for any other purpose than to carry out the contract.⁸ But in England at least it has been held that a contract which creates no equitable interest in the land is not specifically enforceable against a purchaser with notice,⁹ even though a decree would have been granted against the original obligor.¹⁰ Hence the first theory seems the more satisfactory. The cases ¹¹

⁵ *London & S. W. Ry. Co. v. Gomm*, 20 Ch. D. 562; *Woodall v. Clifton*, [1905] 2 Ch. 257. *Cf. Winsor v. Mills*, 157 Mass. 362, 32 N. E. 352. Since equity would refuse to enforce specifically an option after an unreasonable time had elapsed, there is no need for this restriction in the policy behind the rule. *Hanly v. Watterson*, 39 W. Va. 214, 19 S. E. 536. *Cf. Stone v. Harman*, 31 Minn. 512, 19 N. W. 88. It can be explained only on the ground that equitable interests are actually created which infringe the letter of the rule.

⁶ *Worthing Corporation v. Heather*, [1906] 2 Ch. 532. Moreover it will be specifically enforced as the personal covenant of a vendor still owning the land, even though it is a corporation having perpetual existence. *South Eastern Ry. Co. v. Associated Portland Cement Manufacturers, Ltd.*, [1910] 1 Ch. 12. If the application of the rule to such equitable interests rested on the ground that they offend the spirit of the rule, it would seem that the legal contract should be declared void, for it does tend to make the vendor convey no matter how long a time has elapsed.

⁷ *Cummins v. Beavers*, 103 Va. 230, 48 S. E. 891; *Mansfield v. Hodgdon*, 147 Mass. 304, 17 N. E. 544; *Sizer v. Clark*, 116 Wis. 534, 93 N. W. 539; *Kerr v. Day*, 14 Pa. St. 112; *Smith v. Bingham*, 156 Cal. 359, 104 Pac. 689.

⁸ Where the intervening purchaser intentionally interferes with the contract a tort is committed. *Lumley v. Gye*, 2 E. & B. 216. For this it would seem specific reparation might be decreed where as in the case of a contract to keep open an offer to sell land, the legal remedies were inadequate. But a donee or a negligently intermeddling purchaser could not be held on this ground.

⁹ *Martin v. Martin*, 2 Russ. & M. 507; *Norton v. Florence etc. Co.*, 7 Ch. D. 332; *Hicks v. Powell*, L. R. 4 Ch. 741; *Norris v. Chambers*, 29 Beav. 246; *aff'd* 2 De G., F. & J. 583. In the last case a vendor contracted to convey Prussian land to the plaintiff. By Prussian law such a contract created no equitable interest in the land. The vendor conveyed to the defendant, who took with notice. The plaintiff brought a bill for specific performance against the vendor and defendant. All parties were subject to the jurisdiction of the English court of chancery. Yet specific performance was refused.

¹⁰ *Ex parte Pollard*, Mont. & C. 239. *Cf. Lord Cranstown v. Johnston*, 3 Ves. 170. In the former case a contract to give a mortgage on Scottish land was specifically enforced against the mortgagor's trustee in bankruptcy, although by Scotch law the contract created no equitable interest in the land.

¹¹ *Gustin v. Union School District*, 94 Mich. 502, 54 N. W. 156; *In re Adams*, 27 Ch. D. 394.

holding that on the death of a lessee having an option to purchase the fee, his executor succeeds to the option may likewise be reconciled with this doctrine. For the contingency on which the springing use can vest is limited to the life of the purchaser, since the legal promise is to convey only at the option of the purchaser himself, and the possibility of specific performance of the contract is, strictly speaking, terminated at his death. But the law creates a new legal obligation between the vendor and the purchaser's executor, and since it is of the kind equity will specifically enforce a new equitable interest arises in the executor.¹²

JURISDICTION OVER FOREIGN CORPORATIONS THAT HAVE CEASED TO DO BUSINESS IN THE STATE. — A foreign corporation, not being a resident,¹ and being incapable of actual personal service within the state,² can be served only constructively by consent.³ Such consent is almost universally obtained to-day by legislation.⁴ The statute may actually require as a condition precedent to the doing of business within the state an express consent accompanied by the designation of an agent to receive process in behalf of the corporation.⁵ Or consent may be obtained from the fact that the corporation, with full knowledge of a statute providing that any corporation which does business in the state consents to receive service, engaged in business which without such consent would be illegal.⁶

A question which frequently arises under such statutes is whether a foreign corporation which has done business in the state but has withdrawn is amenable to process served upon its agent in the state. The answer must depend chiefly on the proper interpretation of the statute involved. If the legislature has been sufficiently careful to declare that the authority of the designated agent cannot be withdrawn under certain conditions, a revocation under the conditions stated is invalid.⁷ If, on the other hand, the statute expressly confines the authority of the agent to the time during which the corporation is doing business in the state, it is equally clear that the cessation of business by the corporation deprives the courts of jurisdiction.⁸ A more difficult problem is pre-

¹² If the interest vests during the life of the purchaser, however, equity, as in the case of a mortgage, will protect the heir from forfeiting the equitable fee on the death of the ancestor without obtaining the land, and will make the executor a constructive trustee of the contract, with a duty to pay the purchase price.

¹ *People v. Barker*, 141 N. Y. 118, 35 N. E. 1073; *Boston Investment Co. v. Boston*, 158 Mass. 461, 33 N. E. 580.

² *Middlebrooks v. Springfield Fire Ins. Co.*, 14 Conn. 301; *McQueen v. Middletown Mfg. Co.* 16 Johns. (N. Y.) 5. In some jurisdictions a foreign corporation doing business is considered "found" within the state for purposes of service of process without the aid of any principle of consent. *Hayden v. Androscoggin Mills*, 1 Fed. 93; *Williams v. East Tennessee, V., & G. Ry. Co.*, 90 Ga. 519, 16 S. E. 303.

³ But *cf.* *Newbury v. Von Coppen*, 7 Q. B. 293; *Libbey v. Hodgdon*, 9 N. H. 394.

⁴ For the statutory regulations in the individual states, see BEALE, *FOREIGN CORPORATIONS*, Chap. VII.

⁵ *Firemen's Ins. Co. v. Thompson*, 155 Ill. 204, 40 N. E. 488; *Reyer v. Odd Fellows' Accident Association*, 157 Mass. 367, 32 N. E. 469.

⁶ *St. Clair v. Cox*, 106 U. S. 350; *Walker v. Continental Ins. Co.*, 12 Utah 331.

⁷ *Home Benefit Society v. Muehl*, 22 Ky. L. Rep. 378, 59 S. W. 520; *McCord Lumber Co. v. Doyle*, 97 Fed. 22.

⁸ *Guthrie v. Connecticut Indemnity Association*, 101 Tenn. 643, 49 S. W. 829; *Swan*